(3)

NO: 08-1325

In The

Supreme Court of the United States

DEREK BARR, CRAIG WHITE, and CHRIS WHITE,

Petitioners,

V.

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Question #1:

Are content-based restrictions on student speech narrowly tailored where they support the educational mission of the school, but also prohibit more speech than is necessary to prevent disruption?

Question #2:

Can the "offensiveness" of a symbol, coupled with a tense school environment, create an irrebuttable presumption that the symbol is likely to cause disruption?

Question #3:

Can restrictions on student speech in a public school be justified via a heckler's veto?

TABLE OF CONTENTS

	Page
Questions Presented[1]	i
Table of Contents	ii
Table of Authorities	iv
Reply Brief of the Petitioners	1
Summary	1
Respondents' Brief Misrepresented the Sixth Circuit's Holding on Substantial Government Interest	4
Tinker's Narrow Tailoring Requirement is Absent from the Sixth Circuit's Opinion	5
Irrebuttable Presumptions Are Inherent in the Sixth Circuit's Opinion	7
Undisputed Facts Support Granting the Petition	8
Respondents' Facts Are Disputed and Are Irrelevant to the Questions Presented	9

[1] The respondents' attempt to change those questions reflects respondents' understanding that the questions *as presented* should lead to reversal of the Sixth Circuit's ruling.

Mootness Does Not Apply to Claims for Damages 11

Heckler's Veto Raised Below 12

Conclusion 14

Appendix
Part A 1c
Petition for En Banc Rehearing

Part B
Partial Deposition Transcript of Alvin Hord 18c

Part C
Partial Deposition Transcript of Nicole White 22c

Part D
Declaration of Nicole White 24c

TABLE OF AUTHORITIES

Cases	**Page**
Brown v. Louisiana, 383 U.S. 131 (1966)	13
Cary v. Piphus, 435 U.S. 247 (1978)	12
Memphis Light, Gas, and Water Division v. Craft, 436 U.S. 1 (1978)	11, 12
Morse v. Fredrick, 127 S.Ct. 2618 (2008)	5
Police Dept. of the city of Chicago v. Mosley, 408 U.S. 92 (1972)	5
Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005)	7, 9
Tinker v. Des Moines School Dist., 393 U.S. 503 (1969)	Passim
Rules	
Federal Rule of Civil Procedure 8(f)	11
Dictionary	
Black's Law Dictionary (Bryan Garner ed., 7th Ed., West 1999)	7, 8

REPLY BRIEF OF PETITIONERS

The petitioners respectfully submit this reply brief to their petition for a writ of certiorari. This reply brief is submitted to point out factual errors and erroneous legal conclusions asserted in respondents' brief in opposition.

SUMMARY

Not one single fact asserted by the petitioners is denied, questioned, or even contextualized by the respondents' brief. Respondents fail to deny these facts because they understand that the facts relevant to support the instant petition are undeniable. The petition should be granted because it presents clear questions arising from undisputed facts.

Respondents' brief does cite, and misrepresents, evidence in an attempt to prove that racial tension was high in the school at issue. However, even if true, this fact simply illustrates that the new standard established by the Sixth Circuit violates existing precedent. Since undisputed evidence proves that the Confederate flag was present in the school at least dozens of times, yet caused no disruption at all, the Sixth Circuit's presumption that the Confederate flag will always cause disruption in schools with high racial tension is conclusively proven to be false. (*See* Pet. App. 12a; 73a).

Nothing in respondents' brief disputes precedent from other circuits that has found similar

speech restrictions unconstitutional when more speech was being restricted than was necessary to prevent disruption. Respondents' brief also agrees with the petitioners' assertion that the Sixth Circuit now interprets *Tinker* to allow schools to restrict more speech than is necessary to prevent disruption. Resp. Br. 10-12. Yet respondents' brief argues that this does not represent a circuit split on this issue. *Id* at 12-13.

Respondents' brief cites exactly zero cases where similar speech restrictions were found constitutional *despite the complete absence of evidence linking the banned symbol to any past disruptions.* The Sixth Circuit's new precedent abolishes *Tinker's* requirement that the school prove a link between the banned symbol and disruption caused by that symbol: "it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that *the students' activities* would materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 513 (1969)(emphasis added).

The respondents' brief agrees with the Sixth Circuit's ruling that schools should be allowed to categorically ban the Confederate flag by simply establishing that "racial tension is high" in the school. Resp. Br. 10-12. Yet the respondents' brief failed to address the fact that tension was extremely high regarding the Vietnam war at the time of *Tinker*. In *Tinker* high tension alone was not enough to justify that ban. To the contrary, the *Tinker* Court specifically discussed the volatile environment, but

then pointed to a lack of any link between "engaging in the forbidden conduct" and any past disruptions, holding that in the absence of such evidence the ban was based upon "undifferentiated fear." *Tinker*, 393 U.S. at 508 & 509. Therefore, the Sixth Circuit opinion has effectively overruled the Supreme Court.

Next, the respondents' brief denies that the lower courts created an irrebuttable presumption. Resp. Br. 17. However, this assertion is refuted by the simple language of the Sixth Circuit's holding: "We simply hold that the school's dress code as applied to the ban on the Confederate flag is constitutional because of the disruptive potential of the flag in a school where racial tension is high." Pet. App. 29a. Presumption: where racial tension is high, the Confederate flag will cause disruption. (*See* Black's Law Dictionary, 1203-4 (Bryan Gardner ed., 7th ed., West 1999). Ignoring direct and undisputed evidence to the contrary, on review of summary judgment, raises the presumption to irrebuttable status. *Id.*

Finally, the respondents' brief takes great effort to convince this Court that the Sixth Circuit didn't hold the school's substantial government interest to be its broad mission to "educate students." Resp. Br. 8-9. But again, the respondents brief attempts to hide the simple language of the Sixth Circuit's holding. (*See* Pet. App. 47a.)

RESPONDENTS' BRIEF MISREPRESENTED THE SIXTH CIRCUIT'S HOLDING ON SUBSTANTIAL GOVERNMENT INTEREST

The challenged Sixth Circuit opinion clearly states "We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the state and the school's substantial interest in educating students, and we affirm the district court's grant of summary judgment to Defendants-Appellees on Plaintiffs-Appellants' Equal Protection claim." Pet. App. 47a. Yet the respondents' brief asserts "The Sixth Circuit did not designate the school's broad educational mission as the substantial governmental interest." Resp. Br. 8.

In an effort to support their assertion the respondents brief completely ignores the appellate court's one-sentence holding and instead quotes a section of the court's opinion that had nothing to do with equal protection analysis. *Id* (*quoting* Pet. App. 16a).

This quote is further used to misrepresent the lower court's opinion by placing it back-to-back in a single paragraph with another quote from the opinion. *Id*. The second quote begins with "Therefore,..." The clear intent of the respondents brief is to imply that the conclusion of the second quote flows from the discussion of the preceding quote. *Id*. However, the actual opinion has *two intervening pages* between these two quotes. (*Compare* Resp. Br. 8 *to* Pet. App. 16a & 20a).

The respondents efforts to re-write the Sixth Circuit's opinion, rather than acknowledge its one-sentence holding, reflects their understanding that the challenged opinion would eliminate any narrow tailoring requirement in the school setting. It reflects the respondents understanding that the challenged opinion creates a Circuit split on these issues. Finally, it reflects the respondents' understanding that the challenged opinion flaunts the explicit warning of two Supreme Court justices. (*See Morse v. Frederick*, 127 S.Ct. 2618, 2637 (2008)).

TINKER'S NARROW TAILORING REQUIREMENT IS ABSENT FROM THE SIXTH CIRCUIT'S OPINION

The respondents' brief correctly points out that the *Tinker* standard incorporates a narrow tailoring requirement. Resp. Br. 10-12. However, the respondents ignore the fact that the Sixth Circuit's opinion eliminates that narrow tailoring requirement. (*See* Pet. App. 46a-47a).

A regulation that prohibits more speech than is necessary to prevent disruption is not narrowly tailored. *Police Dept. of the city of Chicago v. Mosley*, 408 U.S. 92, 99 & 101 (1972). A regulation can prevent disruption *and* can *also* fail to be narrowly tailored. For example, a regulation that prohibits *all* expression of opinion would be certain to prevent disruption, but would *also* be completely untailored and would therefore be certain to violate the First Amendment.

The *Tinker* opinion incorporates the narrow tailoring requirement. It requires a school to prove that a "prohibition of expression...*is necessary* to avoid material and substantial interference with schoolwork." *Tinker,* 393 U.S. at 511(emphasis added). Therefore, if expressions of opinion are *unnecessarily* prohibited, then the regulation "is not constitutionally permissible." *Id.* In other words, if a regulation prevents disruption but also prevents more speech than is necessary to prevent that disruption, it is not narrowly tailored. *Tinker* clearly requires schools to tailor their speech restrictions to prevent only those expressions of opinion that are "necessary" to prevent disruption. *Id.*

Yet the Sixth Circuit's ruling explicitly rejected the narrow tailoring requirement. Instead it concluded "our analysis of the Plaintiff-Appellants' Equal Protection claim is essentially the same as our analysis of Plaintiff-Appellants' First Amendment claim." Pet. App. 46a. It later concludes, "We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the state and the school's substantial interest in educating students." Pet. App. 47a. But this analysis ignores the critical point that even if the ban prevents disruption, it must *also* prevent no more speech than is necessary to prevent that disruption. *Tinker*, 393 U.S. at 511.

The Sixth Circuit acknowledged and dismissed undisputed evidence that the challenged regulation prohibits *all* displays of the Confederate flag, even when school officials are certain that such a display will not, in fact, cause any disruption. Pet. App. 4a &

12a (*see also* Pet. App. 124a, 130a, 134a-135a). It dismissed this undisputed fact because it omitted the narrow tailoring requirement of *Tinker*.

The challenged ruling not only violates Supreme Court precedent, it also leaves a clear Circuit split on this issue. While respondents' brief claims that no conflict exists, it fails to address any of the cases presented from other Circuits with opposite rulings. *See* Pet. Br. 18-21 (*citing* five cases from three other Circuits).

The respondents' brief does not address this precedent because the respondents realize that the challenged ruling creates a clear Circuit split on the issue of narrow tailoring in the school setting.

IRREBUTTABLE PRESUMPTIONS ARE INHERENT IN SIXTH CIRCUIT'S OPINION

Respondents' brief denies that the Sixth Circuit created any presumptions in reaching the challenged decision. Resp. Br. 18. Instead they claim that the Sixth Circuit "merely drew inferences."[2] *Id.*

However, Black's Law Dictionary defines "presumption" as "A legal inference or assumption." 1203 (Bryan Garner ed., 7th ed., West 1999). In other

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[2] The respondents' brief apparently concedes that the Sixth Circuit failed to follow its own precedent that in considering summary judgment Courts "must give the *non-movant* the benefit of every reasonable inference." *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005)(emphasis added).

words, *an inference is a presumption*. Therefore, by the respondents own admission the challenged ruling created a presumption. *Id* at 1203. It then raised that presumption to irrebuttable status.

The challenged ruling upheld entry of *summary judgment* despite undisputed evidence that the Confederate flag had been present in the school dozens of times, yet had never caused any disruption whatsoever. (*See* Pet. App. 12a; 73a). The Sixth Circuit's holding not only creates a presumption that the Confederate flag will cause disruption in a school where racial tension is high, it ignores direct and undisputed evidence to the contrary. *Id*. This is the definition of an irrebuttable presumption. Black's Law Dictionary, 7th ed. 1203-4.

UNDISPUTED FACTS SUPPORT GRANTING THE PETITION

The respondents did not dispute the facts as set forth by the petitioners. The undisputed facts set forth by the petitioners' fully support granting the petition.

Respondents did assert additional facts in an attempt to show "high racial tension" in the school at issue. However, none of the facts cited by the respondents' show a link between the Confederate flag and any disruption. The only connections between the Confederate flag and disruptions are in the minds of the respondents, and in the presumptions of the lower courts. Absolutely no *evidence* makes this connection.

RESPONDENTS' FACTS ARE DISPUTED AND ARE IRRELEVANT TO THE QUESTIONS PRESENTED

It is important to keep in mind that the challenged opinion upheld summary judgment against the petitioners. Pet. App. 3a. Yet most of the facts asserted by the respondents' brief, and relied upon by the courts below, are supported only by an affidavit of a named defendant.[3] Resp. Br. 2-3. Existence and admissibility of evidence supporting the respondents' broad assertions has been disputed at every stage of this litigation. (*See* Pet. for En Banc Rehearing filed with the Sixth Circuit, reproduced below at Pet. Reply Br. App. 1c-17c).

The respondents assert that there were physical altercations between Caucasian and African-American students, as well as multiple threats against African-American students. Resp. Br. 2-3. Yet the only citation supporting this assertion is an affidavit of a named defendant. *Id.*

Next the respondents assert that the school at issue was "locked down" because of threats of violence against African-Americans, again simply citing the named defendant's affidavit. Resp. Br. 2-3. Yet the motive for the lock down has always been hotly disputed. The same defendant later testified that he locked down the school to give the public impression that he was "doing something" about

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[3] The presumptions made by the lower courts in this case reflect those courts giving the wrong party "every reasonable inference." *Spirit Airlines*, 431 F.3d 917.

perceived problems in the school. Depo. Hord, Jan. 4, 2007, reproduced at Pet Reply Br. App. 18c-21c.

Next, the respondents and the lower courts all cite petitioners' deposition statements regarding racially related violence and threats of violence at the school, as well as petitioners' statements about how other symbols were handled by the respondents. Resp. Br. 3-4. Yet these statements were made about incidents to which the petitioners had *no personal knowledge*. The questions cited asked the petitioners about their *impressions* and what they had heard from other students. The Sixth Circuit refused to consider petitioners' objections regarding these statements. (*See* Pet. App. 21a-22a; *see also* Pet. for En Banc Rehearing filed with the Sixth Circuit, reproduced below at Pet. Reply Br. App. 1c-17c). [4]

The respondents' brief was also misleading about certain facts. In their brief the respondents state that students were informed that the ban on the Confederate flag was "due to the racial hostility" at the school, citing the Sixth Circuit's opinion. Resp. Br. 3 (citing Pet. App. 4a). Yet, the citation does not support the respondents' assertion of racial hostility being announced as the motive for the ban. *See* Pet. App. 4a.

What is left of the respondents' new facts are some statistics regarding percentage of minorities in the school, and some graffiti that lead to no

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[4] Note that the Sixth Circuit explicitly refused to consider evidentiary objections raised by the plaintiff-appellants, and therefore refused to perform an en banc review of facts. (*See* App 21a-22a; *see also* App. 1c-17c).

disruptions whatsoever. If graffiti and population statistics suffice to support speech restrictions in schools, no school in the country would have any free speech.

Most importantly, none of the respondents' asserted facts change or challenge one single fact asserted by the petitioners in support of their petition. The facts that support the petition are undisputed.

The petition should be granted because it presents clear questions arising from undisputed facts.

MOOTNESS DOES NOT APPLY TO CLAIMS FOR DAMAGES

Respondents' brief incorrectly asserts that the instant petition should be denied as moot. Resp. Br. 4-6. Respondents' argument rests on their assertion that no evidence of damages was entered into the record prior to summary judgment, and that "Petitioners sought no nominal damages." [5] *Id.*

This Court has previously explained that a claim for damages *alone* is sufficient to overcome mootness, so long as the claim for damages is not so insubstantial as to prevent proceeding with the instant review. *Memphis light, Gas, and Water Division v. Craft*, 436 U.S. 1, 10 (1978).

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[5] Respondents' attempt to deny this Court jurisdiction of the instant case by pointing to a pleading technicality also runs contrary to the Federal Rules of Civil Procedure that "All pleadings shall be so construed as to do substantial justice." Rule 8(f).

The petitioners' complaint includes a request for damages. Resp. Br. 6, *citing* Resp. Br. App. 19b, 20b. Therefore, this petition cannot be held moot. *Memphis light, Gas, and Water Division*, 436 U.S. 1.

Also, as respondents pointed out, "Petitioners prayed for damages, according to proof." Resp. Br. 6, *citing* Resp. Br. App. 19b, 20b. Damages "according to proof" is inclusive of nominal damages because deprivation of constitutional rights "that are not shown to have caused actual injury" result in an award of nominal damages. *Cary v. Piphus*, 435 U.S. 247, 266 (1978). Therefore, if the "proof" shows no actual damages, then nominal damages are awarded.

Also, actual proof of damages has been shown. Certain petitioners declined to re-enroll in public school because of the challenged regulation. Pet. Reply Br. App. 19c-21c. These petitioners, therefore, lost the monetary value associated with receiving a public education and also incurred costs associated with home schooling.

For all of the above reasons, petitioners' claims for damages cannot be held moot.

HECKLER'S VETO RAISED BELOW

Respondents brief asserts that "The record is devoid of any evidence of a 'heckler's veto.'" Resp. Br. 7. However, respondents' justification of their speech restriction is based upon *their* own assertion that other students respond negatively to the Confederate flag in a school with a racially tense environment.

See Resp. Br. at 3. The respondents' own assertions fit the definition of a "heckler's veto": a listeners' negative reactions to a particular message. (*See Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966)). The fact that the respondents didn't use the term "heckler's veto" doesn't change the fact that their defense has relied upon a heckler's veto argument from the beginning.

The forecasted disruptions had to be premised upon expected negative reactions of listeners because no wearer of the banned symbol ever caused a disruption. Pet. App. 73a. It is undisputed that several students displayed the Confederate flag in the school at least dozens of times, but none of those students ever caused any disruptions. Pet. App. 12a & 73a; Pet. Reply Br. App. 21c. Since the students wearing the flag were not the source of any trouble, the *only* logical conclusion is that the forecasted disruptions upon which the respondents justify their speech restriction *must* be anticipated to be caused by *other* students reacting negatively to the Confederate flag. Again, this is a heckler's veto.

Presumptions that a heckler's veto would lead to disruption was at the core of the respondents own defense, and were the at the core of the lower court's rulings.

This logic is confirmed by the Sixth Circuit's opinion: "Hord acknowledges that the disruption he anticipates arising from displays of the Confederate flag directly correlates with the offense the flag poses to some students." Pet. App. 27a.

CONCLUSION

For the reasons discussed above the request for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX
Part A
Petitioners' Petition for En Banc Rehearing

UNITED STATES DISTRICT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEREK BARR, CRAIG WHITE
and CHRIS WHITE, by and
through their parent and guardian,
ROGER WHITE

Plaintiffs/Appellants,

CASE NO: 07-5743

STEVE LAFON, in his individual and official Capacity as Principal of William Blount High School; ALVIN HORD, in his official capacity as Director of Schools; and THE BLOUNT COUNTY SCHOOL BOARD

Defendants/Appellees

APPELLANTS' PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

I. STATEMENT FOR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure plaintiff/appellants hereby petition this Court for a rehearing with

suggestion for rehearing en banc. Rehearing is requested from this Court's published opinion in the above-entitled case, entered August 20, 2008. See *Barr v. Lafon*, 07-5743 (6th Cir. Aug. 20, 2008).

The grounds supporting this petition include plaintiff-appellants respectful assertion that the panel decision conflicts with the United States Supreme Court's decisions in *Turner Broadcasting v. F.C.C.*, *R. A. V. v. City of St. Paul*, *Department of the City of Chicago v. Mosley*, and *Tinker v. Des Moines Independent Community School District*. 512 U.S. 622 (1994); 505 U.S. 377 (1992); 408 U.S. 92 (1972); 393 U.S. 503 (1969) (respectively). Therefore consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

This petition is also grounded upon the panel decision's overturning of the holding of this Circuit's decision in *Castorina v. Madison County School Board*. 246 F3d. 536 (2001).

Finally, this petition is also grounded upon the plaintiff-appellants respectful assertion that the panel erroneously applied an abuse of discretion standard in reviewing admissibility of evidence when de novo review is the correct standard.

II. BACKGROUND

Plaintiff-appellants are students attending public high school in Blount County Tennessee. The appellants filed suit alleging violations of their First and Fourteenth Amendment rights caused by the enforcement of a ban on all depictions of the

Confederate flag at their high school. The District Court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment. The plaintiffs appealed and this Court upheld the District Court's summary dismissal in an opinion recommended for publication. See *Barr v. Lafon*, 07-5743 (6th Cir. Aug. 20, 2008).

III. GROUNDS

A. The Panel's Distinguishing of the Instant Case from *Mosley* is Contrary to Precedent

The panel's opinion distinguished the Supreme Court's *Police Department of City of Chicago v. Mosley* from the instant case by stating:

> "*Mosley* involved adult speech in a public forum, while the instant case involves student speech in a public school, which is a limited public forum. Thus, *Tinker* sets the guiding standard for the instant case while that was not true of *Mosley*." *Barr*, slip op. at 18, *discussing* 408 U.S. 92 (1972).

The appellants respectfully assert that *Mosley* did, in fact, explicitly follow *Tinker*. *Mosley* is an extension of *Tinker*. *Mosley* explains that, in the context of the school forum, *Tinker* is the substantial government interest element of an equal protection analysis when such an analysis is necessary. When a content-based regulation is at issue *and* if the *Tinker* standard is met, then the next step is to determine

whether the content-based regulation is narrowly tailored. The *Tinker* Court never reached this step because in *that* case the *Tinker* standard was *not* met. The *Mosley* opinion, by contrast describes what is done if the initial *Tinker* standard is met *and* a content-based regulation is at issue.

This understanding of the interrelation between *Tinker* and *Mosley* resolves the apparent conflicts that the panel struggles to address in its opinion.[6] See *Barr*, slip op. at 13-15.

This is why the *Mosley* Court cites, discusses, and quotes *Tinker* throughout its opinion. *See* 408 U.S. 92 (1972). *Mosley* followed, and then extended *Tinker*. See *Id.* This is why the *Mosley* opinion explicitly discusses the "intersection" of free expression and equal protection. *Id* at 101.

The two distinguishing facts identified by this Court between the instant case and *Mosley* are not dispositive. The *Mosley* opinion itself, as well as the Supreme Court's recent decision in *Morse v. Frederick* illustrate this point. In *Morse* the student

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[6] Note also that the panel's quote from *Tinker* in support of its assertion that actual viewpoint discrimination is permissible if the *Tinker* standard is applied, does not support that assertion. See *Barr*, Slip op. at 13, quoting *Tinker* at 511. The *Tinker* quote is affirmatively pointing out what is *not* constitutional. Taking positive inference taken from what this quote explicitly chooses to *not* consider (what is constitutional) is a certain path to unintended meaning. In other words, *Tinker*'s statement that viewpoint discrimination is not allowed "at least" in the absence of specific circumstances, does not lead to the conclusion that viewpoint discrimination *is* allowed in *all* cases if those circumstances were present. The absence of a negative does not prove the presence of the positive.

at issue was an eighteen year old senior who was standing across the street from the school, completely off school property, at the time of the challenged incident. *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006). He had not attended class nor had he checked in with the school in any way on the day of the incident. *Id.* Yet despite these facts the Supreme Court applied the *Tinker* standard, declaring that the plaintiff was subject to the limited school forum. *Morse v. Frederick*, 127 S.Ct. 2618 (2007).

By way of comparison, the plaintiff in *Mosley* was arrested while standing on the sidewalk "adjoining" the school. 408 U.S. at 93. Arguably he was more on school property, or within the school forum, than the plaintiff in *Morse*. In *both* cases the Supreme Court applied the *Tinker* standard, establishing that both plaintiffs were subject to the limited school forum. 127 S.Ct. 2618; 408 U.S. 92. In both cases the Supreme Court explained that the consideration of the *Tinker* standard was not the end of the analysis, but simply the first step. The Supreme Court clearly intended its *Mosley* decision to be applied to the school forum.

B. The Panel's Opinion Violates *Mosley* in Light of *Turner Broadcasting v. F.C.C.* and *R.A.V. v. City of St. Paul*

The panel's analysis of appellants' equal protection claim essentially concludes that where a school has met the *Tinker* standard it has, per se, also proven that its regulation is narrowly tailored:

"The question of whether the dress code's ban on racially divisive symbols is narrowly tailored to that purpose asks us to inquire whether the ban meets the standard set forth in *Tinker*. [Cites to previous *Tinker* analysis within the opinion] We therefore hold that the dress code's ban on racially divisive symbols is narrowly tailored to the school's substantial interest..." *Barr*, slip op. at 18.

This conclusion represents a bold dismissal of equal protection precedent as applied to the school setting. This Court appears to be stating that equal protection *cannot* be violated where a school reasonably forecasts disruption.

Alternatively, this may simply be a misunderstanding of the fact that the substantial-government-interest and the narrow-tailoring elements are just that, two distinct, different, and separate elements. As discussed above, *Tinker* simply addresses the substantial government interest element. Where viewpoint discrimination has *not* been alleged, or where the regulation is clearly a content-neutral regulation, then the *Tinker* standard alone completes the analysis. But where the regulation is content-based, then fulfilling *Tinker* is only the first step. Concluding otherwise would negate the need for any discussions regarding the intersection of free speech and equal protection. See *Police Department of the city of Chicago v. Mosley*, 408 U.S. 92 (1972).

The *Mosley* opinion specifically explains that even when a regulation can be justified under its

"clearly more disruptive" test, that regulation must *still* be narrowly tailored:

> "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored *to their legitimate objectives.*" *Mosley*, 408 U.S. at 101 (emphasis added; explicitly discussing *Tinker*).

The term 'narrowly tailored', as it is used in the *Mosley* case, is also well established: Where a regulation on speech is content-based, ***the incidental restriction on First Amendment freedoms must be no greater than is essential to the furtherance of the asserted governmental interest***. *Turner Broadcasting v. F.C.C.*, 512 U.S. 622 (1994); *Mosley*, 408 U.S. 92; *Williams v. Rhodes*, 393 U.S. 23 (1968). In other words, if the regulation bans expressions that could be allowed while still achieving the regulation's goal, then it is not narrowly tailored.

Therefore in the instant case, even if the Confederate flag is "clearly more disruptive" than other flags (*Tinker* standard), the defendants' regulation *still* must not be more restrictive than is absolutely essential to prevent disruption in the school. *Id.* In other words, the defendants' regulation must not prohibit displays of the Confederate flag that would *not* cause disruption. *Id.* In other words, if it is possible to allow some displays while still preventing disruption, then the school *must* do so. *Id.* Under the circumstances of *Mosley*, that Court concluded that narrow tailoring required

individualized analysis of particular displays' potential for disruption.

The *Mosley* Court drew the narrow tailoring line where it did because it was attempting to balance the conflicting concerns of governmental suppression of ideas against the identified substantial governmental interest. *Mosley*, 408 U.S. at 98-99; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The more specifically a regulation defines what is prohibited, the more likely that regulation is actually being used by government officials to punish unpopular ideas. See *Id.* Therefore, the degree of narrow tailoring required is directly proportional to the degree a regulation is content-based (or viewpoint-based). See *Id.*

In the instant case, the more narrowly this Court allows the appellants to define what is prohibited (racially divisive speech as opposed to all race-related speech), the more narrowly tailored the regulation should be. This Court's wholesale rejection of appellants' viewpoint discrimination argument should tend to make the Court *more* likely to adopt the limitations of *Mosley*. When coupled with actual admissions from the appellees that they are not motivated solely by a desire to prevent disruption, narrow tailoring is even more necessary.[7,8]

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[7] Note that the Supreme Court in *R.A.V.* stated that if there is a *possibility* that the defendant school is "seeking to handicap the expression of particular ideas" then the regulation is "presumptively invalid." *R.A.V.*, 505 U.S. at 391.

[8] In the instant case the Confederate flag is being singled out and treated differently than other symbols: the panel notes that "the school alleges that because other symbols have not yet caused a disruption,

The *Mosley* Court not only concluded that narrow tailoring required the defendants to provide *an individualized analysis* of *each prohibited display*, it also concluded that under such circumstances categorical bans, based upon content, should not be allowed at all. *Mosley*, 408 U.S. 92, 100-101.

In the instant case the appellees have admitted that they prohibit *all* displays of the Confederate flag, regardless of likelihood of disruption. JA 101, Dep. LaFon, 23:15-19; 24:5-10; JA 325 Prop. Pre-Trial Or., stip. 9. Therefore the appellants have at least raised a genuine issue regarding the school's failure to narrowly tailor its regulation.

C. The Panel's Opinion Violates *Tinker*

The standard established by the panel's opinion modifies the *Tinker* standard in a way that substantively weakens the Supreme Court's required showing. This fact is proven by the analysis performed by the panel in the instant case.

The *Tinker* standard requires a showing that "the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school...'" *Tinker*, 393 U.S. at 509. This requirement is directly juxtaposed with an explicit explanation of

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they have not been explicitly banned." *Barr*, slip op. at 16, citing J.A. at 110 (Hord Dep. At 14:24-15:4). However, the Confederate flag also has not yet caused a disruption, but *has* been explicitly banned.

what is *not* sufficient to justify restrictions on student speech:

> "Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person *may* start an argument *or cause a disturbance*. But our Constitution says we must take this risk." *Tinker*, 393 U.S. at 508 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949) (emphasis added).

"May" cause a disturbance is *not* sufficient. *Id.* Instead the defendant school must show that the forbidden conduct *would* cause disruption. *Id* at 509.

Compare the *Tinker* standard with this Court's incrementally weakened standard: a school must only show that their "forecast of substantial disruption was reasonable." *Barr*, slip op. at 9, citing *Lowery v. Euverard*, 497 F.3d 584, 591 (6th Cir. 2007). In the instant case, this standard is even further weakened to simply require a showing that "racially motivated incidents at the school caused tension among the student body." *Barr*, slip op. at 7.

This weakened standard caused this Court to completely ignore undisputed evidence that "the forbidden conduct" occurred dozens of times in the school, yet caused absolutely no disruption. *Barr*, slip op. at 5; J.A. at 51 (Lafon Aff. ¶4). This Court concluded, despite this evidence, that no genuine issue of fact exists and the party with the full burden has conclusively proven its case.

In *Tinker* the armbands in question had not caused any actual disruption. 393 U.S. at 505-6. In the instant case the forbidden conduct has not caused any disruption. See *Barr*, slip op. at 7. Yet this Court has concluded that no genuine issue of fact exists and the party with the full burden has conclusively proven its case.

In *Tinker* former students from the school *had died in a war* that was the subject of the debate at issue. Clearly the students at the school felt some "tension among the student body" in relation to this issue. But in the case at bar evidence of "racial tension among the student body" led this court to conclude that the school's "forecast of substantial disruption was reasonable." The panel's opinion discusses evidence of racial tension as if the school in *Tinker* had absolutely zero tension among the student body regarding the war in Vietnam.

The erroneous conclusions by this Court in analyzing the instant case, despite facts analogous to the quintessential case, demonstrates just how far the incremental weakening of *Tinker* has progressed in this Circuit.

The appellants are not suggesting that evidence of racial tension has no relevance to the school's required showing. They are simply pointing out that such evidence, alone, does not constitute conclusively proven justification warranting summary judgment for the defendant school. This Court's current standard results in just such a finding. It results in such a finding despite

undisputed evidence that "the forbidden conduct" does not in fact cause any disruption. See *Barr*, slip op. at 5; J.A. at 51 (Lafon Aff. ¶4). This turns *Tinker* on its head.[9,10,11]

D. The Panel's Opinion Overturns this Court's Holding in *Castroina v. Madison County School Board*

The panel's *Castorina* decision clearly *holds* "If the students' claims...that there were no prior disruptive altercations as a result of Confederate flags are found credible, the court below would be *required* to strike down the students' suspension as a violation of their rights of free speech as set forth in *Tinker*." *Castorina v. Madison County Sch. Bd.*, 246 F3d. 536 (2001). The panel's opinion discards that holding.

As the panel's opinion points out, however, such an overruling of this Court's precedent *requires* an en banc decision. *Barr*, slip op. at 14, citing *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

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[9] On June 27, 2008 the 6th Circuit's Chief Judge Boggs entered a dissenting opinion in another appeal arising from the same underlying case as the instant appeal. See *D.B. v. Lafon*, Amd. Or. Judge Boggs dissent is critical of the standard applied in that appeal, which is very similar to the standard applied in the instant opinion.

[10] The *Tinker* Court stated: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" 393 U.S. at 512.

E. The Panel Mis-Applied *U.S. v. Khalil* and Did Not Perform a De Novo Review

The panel's opinion explains that the appellants waived certain admissibility issues because they were not specific enough in raising objections to admissibility. *Barr*, slip op. at 9. However, this statement fundamentally misconstrues the procedural status of this case, the burdens at issue, and this Court's role in performing a de novo review.

The appellants, being the non-moving party, have no burden to prove that evidence relied upon by the moving party is inadmissible. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). To the contrary, at this procedural stage the movant has the entire burden to prove that they can conclusively prove their case, via admissible evidence. *Id.* This is particularly true where the movant has the full burden of proof in the case, such as the school-defendants in the case at bar. See *Tinker*, 393 U.S. 503.

The appellants' suggestion that much of the movants' evidence is clearly inadmissible was simply intended to alert this Court to an evidentiary issue of particular importance. However, regardless of the presence or absence of the appellants' assertion, it is *this Court's* duty to consider *all* evidentiary issues, while performing its *de novo* review of the movants' evidence. *Bose Corp. v. Consumer's Union of U.S.*, 466 U.S. 485, 499 (1984). A review of this Court's opinion reveals that it simply presumed admissibility

of all of movants' evidence, in the absence of required foundational support.

In support of it's assertion that the non-movant waived all admissibility issues this Court's opinion cites *U.S. v. Khalil* stating that "all evidentiary rulings of the district court, including it's determination of whether testimony is inadmissible hearsay, are reviewed for abuse of discretion." *Barr*, slip op. at 9. However, *Khalil* is inapplicable because it involved a *post-trial* review of admissibility in relation to specific objections made at trial. The appellants in the case at bar have not had their trial yet. That is why de novo review is required.

More importantly, because of the procedural status of the instant case the movant has not provided the required foundational support that would allow an in-depth analysis of evidence on an objection-by-objection basis. The appellants cannot be expected to provide a detailed analysis of objections where the movant has not yet provided the foundational evidence that would allow such analysis.

At the summary judgment stage the movants' have the *full burden* to provide any required foundational support that *proves* that their substantive evidence is admissible. That is why all possible inferences must be made for the non-movant, and why de novo review is required. *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 700 (6th Cir. 2007).

This Courts opinion explicitly states that it applied an abuse of discretion standard in reviewing admissibility of evidence:

> "Because the Plaintiffs-Appellants do not specify to which pieces of evidence they are referring, we have no basis upon which to conclude that the district court abused its discretion..." *Barr*, slip op. at 9.

This is simply an erroneous standard, explicitly applied. See *Clay*, 501 F.3d at 700.

A review of the panel's opinion further reveals that it inappropriately weighed evidence and erroneously ignored inferences that favored the appellants. Space limitations for the purposes of this petition do not allow for a comprehensive review of the panel's treatment of evidence. However, by way of example:

1. The panel's factual conclusion that the February 22 fight was racially motivated is directly contradicted by official conclusions of a U.S. Department of Education investigation. Compare *Barr*, slip op. at 3 with JA 291 (USDE ltr). The panel's opinion actually *guesses* that the Department of Education made incorrect conclusions in its official investigation. *Barr*, slip op. at FN 2.

2. Undisputed evidence proves that the Confederate flag was present in the School

at least dozens of times, despite the ban, yet never caused a single disruption. *Barr*, slip op. at 5, citing JA at 51 (Lafon Aff. At ¶ 4). The panel never discusses the relevance of this evidence and refused to accept the inference that if the symbol at issue actually *did not* cause disruption, a forecast that it *would* cause disruption *may* be unreasonable.

3. The panel makes passing note of defendant Hord's admission that he would keep the ban in place even if he knew the Confederate flag would not cause disruption, yet the panel dismisses this evidence as completely irrelevant. *Barr*, slip op. at 5 & 11.

Rather than performing a de novo review and giving the non-movant all reasonable inferences, the panel's opinion adopts all of the movants' evidence as per se admissible as well as conclusive on the points of fact asserted by the movant.

IV. CONCLUSION

The appellants respectfully request that this Court **GRANT** the appellants' petition to rehear this appeal.

Dated: 9/4/08

s/Van R. Irion
Van R. Irion BPR# 024519
2327 Laurel Lake Road
Knoxville, TN 37932

Attorney for Plaintiff-
Appellants
(865) 809-1505

CERTIFICATE OF SERVICE

It is hereby certified that on September 4, 2008, a copy of "Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc" was mailed to counsel for all appellees.

Dated: 9/4/08

s/Van R. Irion
Van R. Irion BPR# 024519

Part B
Partial Deposition Transcript of Alvin Hord, January 4, 2007

DEPOSITION OF ALVIN LEE HORD

January 4, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official capacity; ALVIN HORD, in his official capacity, and BLOUNT COUNTY SCHOOL BOARD,
Defendants.

Civil Action
No. 3:06-CV-75 (VARLAN/SHIRLEY)

In time would that be enough to lock-down the campus?
A. Yes, it has been locked down before, we have had a gun there before.
Q. Would you lock-down the campus if there was a threat of the gun?
A. I would depend on the Principals, the School Resource Officers and the people that were there.
Q. The circumstances of the given case; right?
A. Yes. And the Principal has that authority and the SRO's under his direction to do that.
Q. Has a threat of a gun on campus or information about a gun on campus ever led to a lock-down in any of the schools in Blount County that you're aware of?
A. Well, I—yes, in February of 2003 there was a threat of a gun and the school was locked-down and they found one.
Q. All right. And so the threat of a gun or I should say information coming to you that a gun was on campus on April 6, 2005 by itself would have been enough to lock-down the campus on that day?
A. Yes.
Q. And isn't it that what the lock-down was really about?
A. No.
Q. So the lock-down was about other things as you said, the build-up?
A. I was accused of not being—not going to do anything.

and I was accused of doing too much, and all the accusations of people saying, you know, you're not doing anything, you're ignoring this, I was trying to lay to rest. And in this climate of Columbine and everything that has happened, I don't think that I could have not taken the action that I did that day. And it is just a culmination of all that, it is not one specific thing but it is a lot of things.

Q. So you were concerned about the Cleveland case—let me rephrase.

The fact that the Cleveland case was—or the—let me try it again.

The incidents of February '05 leading to a complaint was part of what you're talking about now?

A. That was not Cleveland, that was another.

Q. Another student?

A. Another student.

Q. But that was part of the build-up?

A. Yeah, it was part of it.

Q. And Mr. Cleveland's numerous calls and complaints were part of it?

A. It was part of it.

Q. And so you did want to show that you were doing something?

A. And I wanted to show the people that they could send kids to school and they would be safe and there wouldn't be any

guns there. And rumors were going around that there were guns there and I was trying to dispel that and lay that to rest.
Q. The incidents that led up to the lock-down, were any of the plaintiffs in this case involved in any of those incidents to your knowledge?
A. Not to my knowledge, no.
Q. And were the Plaintiffs in this case involved in the February '05 incident?
A. Not to my knowledge.
Q. Are you aware of the Plaintiffs in this case being disciplined for anything?
A. No. I became aware of it after the suit was filed and, you know, all up to that point I was not.
Q. So we have discussed the lock-down of April 6 and we have discussed the February '05 incident and you have mentioned several other things that build-up to the lock-down. Are there any other incidents that we haven't mentioned yet that you would cite for justification on the Confederate flag?
A. Not—the only thing that I can think of is that letter that Vandy Kemp dealt with a student at Heritage, it was not the same school, but that was stuff where she responded about the ban, why the—
Mr. Irion: That will be disclosed: correct?
A. Yes.
Ms. Atkins: Yes. Do you want to see it?

Part C
Partial Deposition Transcript of Nicole White, January 4, 2007

DEPOSITION OF NICOLE WHITE

January 4, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

D.B., a minor, by and through his parent and guardian, SHARON BROGDON, R.W. and C.W., both minors, by and through their parent and guardian ROGER WHITE,

Plaintiffs,

v.

STEVE LAFON, in his individual and official capacity; ALVIN HORD, in his official capacity, and BLOUNT COUNTY SCHOOL BOARD,
Defendants.

Civil Action
No. 3:06-CV-75 (VARLAN/SHIRLEY)

A. I'm a junior in the process of getting home schooled.
Q. You're a junior at William Blount High School?
A. Uh-huh (Affirmative).
Q. And you're in the process of getting home schooled; is that right?
A. Yeah.
Q. All of your high school, has it been at William Blount High School?
A. Yes.
Q. Do you remember at the end of the '04-'05 school year when there was some racial tensions at William Blount High School?
A. Yeah.
Q. Can you express what your rememberance of those problems consisted of?
A. I thing for about a week there was eighty cops there and they would check you when you go in any when you leave because of the hit list, but that's about it.
Q. Were you aware of the hit list?
A. Yes.
Q. Tell me whay you know about the hit list.
A. It was in one of the girls' bathroom stalls

Part D
Declaration of Nicole White, January 4, 2007

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEREK BARR; CRAIG WHITE
and CHRIS WHITE both minors, by and
through their parent and guardian,
ROGER WHITE

Plaintiffs/Appellants,

v. CASE NO: 07-5743

STEVE LAFON, in his individual and official
Capacity as Principal of William Blount High
School; ALVIN HORD, in his official capacity
as Director of Schools; and THE BLOUNT
COUNTY SCHOOL BOARD

Defendants/Appellees

DECLARATION OF CHRIS NICOLE WHITE

(C.W.)

I, Chris Nicole White declare as follows:

1. I am a plaintiff-appellant in the above-entitled action.

2. I would like to resume attendance of my classes at William Blount High School, and would do so if the ban on the display of Confederate flags was lifted.
3. I declare under penalty of perjury that the foregoing is true and correct.

Dated: 7/3/07

s/Nicole White
Chris Nicole White
Appellant